IN THE

Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

HUGH L. CAREY, *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS-INTERVENORS

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Respondents-Intervenors

LOUIS H. POLLAK
3400 Chestnut Street
Philadelphia, Pa. 19174

Of Counsel

MEILEN PRESS INC. — N. Y. C. 219

INDEX

TABLE OF AUTHORITIES

Cases: PAGE

PAGE

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

HUGH L. CAREY, *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS-INTERVENORS

Question Presented

Are Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, insofar as they altered the Senate and Assembly district lines in Kings County, unconstitutional?

Statutes and Regulations Involved

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, provides in pertinent part:

> Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such preceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Section 51.10, 28 C.F.R., provides in pertinent part:

(a) Each submission shall include:

• • •

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

• • •

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proopsed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates,

by race, who have run for such office in the last two elections and the results of such elections.

Section 51.19, 28 C.F.R. provides:

> Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

Summary of Argument

In renewing the Voting Rights Act in 1970 and 1975 Congress was particularly concerned with the effect of

section 5 on redistricting in covered jurisdictions. The type of districting configuration which section 5 prohibits is the fragmentation of much or all of a non-white community among majority white districts. Congress concluded that such fragmentation generally precluded the election of non-white officials and diluted the value of minority votes.

The 1972 district lines in Kings County minimized minority voting strength in the manner which section 5 was adopted to prevent. Although the non-white community in Kings County is concentrated in a single contiguous ghetto in and around Bedford Stuyvesant, the bulk of that community was divided into small pieces and placed in majority white districts. Because of white bloc voting every one of these districts, and every other predominantly white Senate and Assembly district in New York City, was and is represented by a white. These lines clearly had the discriminatory effect forbidden by section 5, and were properly disapproved by the Attorney General.

The 1974 lines adopted after the Attorney General's decision were not unfair to whites. Although the lines resulted in five new districts with non-white majorities, white candidates were elected in four of these districts. The proportion of Senate and Assembly districts with non-white majorities was still significantly smaller than the proportion of the County population that is non-white.

The sole injury of which petitioners complain is that the Hassidic community has been divided between two Assembly districts and between two Senate districts; petitioners have no objection to being in a predominantly non-white district so long as their community remains intact. Petitioners allege that the sole reason their community was divided was that the division was necessary to create one or more predominantly non-white districts. The record,

however, shows that this was not the actual cause of the division of the Hassidic community. See pp. 28-31, infra.

When New York fashioned the 1974 lines it was clearly obligated to consider the racial composition of the proposed lines. The Attorney General was required to consider that information in assessing whether the proposed 1974 lines were still discriminatory, and New York was required to provide that information to him. 28 C.F.R. §51.10. It would have been impossible to determine whether the 1974 lines unlawfully fragmented the non-white community into predominantly white districts without knowing the racial composition of the districts involved. It would have been irresponsible for New York to have adopted district plans at random, i.e. ignoring the racial composition of the proposed districts, until it stumbled across one which was free of such a discriminatory effect.

The Attorney General's decision objecting to the 1972 lines was correct, and petitioners concede they are not entitled to challenge it on the merits. Although petitioners object that the Attorney General rejected the lines because New York had not proved they were not discriminatory, the regulations placing the burden of proof on the submitting authority were upheld by this Court in *Georgia* v. *United States*, 411 U.S. 526 (1973). It is of no import that the Attorney General made no finding as to the purpose of the 1972 lines, since section 5 forbids the use of lines with a discriminatory effect regardless of their purpose.

In assessing the impact of the 1974 lines New York and the Attorney General needed to know whether the majority of each district's eligible voting age population was white or non-white. Because of several problems with the Census data, however, it was not possible to determine directly and

accurately what portion of the eligible voting age population is white and what portion is non-white. The actual Census data used by the legislature was unadjusted "February Formula" figures. Because of several factors a district with a February Formula non-white total population of 65% is one in which the white and non-white eligible *voting age* population are approximately equal. Regardless of whether, as is unclear on the face of the record, New York used this particular method to determine the eligible voting age population of proposed districts, some such method was required in order to comply with section 5.

Introduction

As the grant of certiorari signifies, this litigation is important. It is important to the people of Brooklyn, and to the integrity of the electoral process in the State of New York. It is important to the full realization of the constitutional mandate of "one man, one vote." And it is important to the full implementation—by the Attorney General of the United States and by the legislatures of the several states, including New York—of the Voting Rights Act of 1965, and of the Fourteenth and Fifteenth Amendments, which that Act enforces.

The legal issues on which this litigation turns are significant, but they are not as complex or as wide-ranging in constitutional implication as they have been made to appear by petitioners' brief and certain of the briefs *amici*. As this litigation has moved upwards to this Court, it has acquired an overlay of doctrinal portentousness and ambiguity unsupported by the particular facts which have given rise to this case or by its particular procedural posture. Properly understood, this case does not require—indeed it does not warrant—present resolution of huge

abstract constitutional issues which lie far beyond the confines of the actual controversy now before this Court. With a view to focusing this Court's attention on the actual controversy, and on the legal issues necessarily implicated by that controversy, we have thought it useful to present a detailed Introduction. What follows is intended to set forth in detail the factual background and foreground of this controversy in the context of the purpose of the Voting Rights Act.

A. Application of the Voting Rights Act to New York

This case has its origins in the 1970 amendments to the Voting Rights Act of 1965. As originally enacted, sections 4 and 5 of the Act applied only to states or subdivisions which, as of November 1, 1964, maintained a literacy test or other test or device and in which, as of the presidential election of 1964, less than 50% of the voting age population registered or voted. 79 Stat. 438, 439. When the Act came up for renewal in 1970, Congress found that in 1968 the registration or voting rate had fallen below 50% in several other jurisdictions, most notably Kings, New York and Bronx Counties in New York.[1] Congress concluded this low rate in New York was the result of New York's literacy test, which was believed to discriminate against black voters who had received an inferior education in segregated schools in both the north and south.[2] Concern was also expressed that New York's literacy test had deterred blacks from seeking to register[3] and had been

---

[1] 116 Cong. Rec. 7654, 6659 (Remarks of Senator Cooper) (1970).

[2] 116 Cong. Rec. 5533 (Remarks of Senator Hruska), 6158-59 (Remarks of Senators Dole and Mitchell), 6661 (Remarks of Senator Griffin) (1970).

[3] 116 Cong. Rec. 5533 (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland) (1970).

adopted for the purpose of discriminating on the basis of race.[4] See *NAACP* v. *New York,* 413 U.S. 345, 370 (1973) (Douglas, *J.,* dissenting). Because of these circumstances Congress altered the coverage formula of sections 4 and 5 so as to apply them to the three counties in New York, which were "a definite target of the 1970 amendments." *NAACP* v. *New York,* 413 U.S. 345, 357 (1973).

In December 1971 the State of New York instituted an action in the District Court for the District of Columbia under section 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a), seeking a declaratory judgment that would exempt New York from provisions of the Act. On April 3, 1972, the United States consented to entry of summary judgment in that case. Four days later the NAACP and certain individuals requested leave to intervene.[5] The motion to intervene was denied, and summary judgment was granted awarding the exemption. *New York* v. *United States,* Civ. No. 2419-71 (D. D. C.) (unreported). On appeal this Court held that the denial of intervention in April 1971 was not improper because the applicants "were free to renew their motion to intervene following the entry of summary judgment since the District Court was required under § 4(a) of the Act, 42 U.S.C. §1973b(a) to retain jurisdiction for five years after judgment." *NAACP* v. *New York,* 413 U.S. 345, 368 (1973). On remand, the applicants renewed their motion to intervene, which was granted on November 5, 1973.

On January 4, 1974, the district court rescinded the exemption *pendente lite,* and New York thereafter submitted its 1972 redistricting plan to the Attorney General

[4] 116 Cong. Rec. 6659 (Remarks of Senator Murphy), 6660 (Remarks of Senator Cooper) (1970).

[5] The intervenors-respondents in this action are the same group and individuals who intervened in *New York* v. *United States.*

for approval under section 5 of the Voting Rights Act. On April 25, 1974, the intervenors moved for summary judgment permanently denying the exemption sought by New York.[6] Intervenors maintained, *inter alia,* that New York's literacy test had the effect of discriminating against blacks because the rate of illiteracy among blacks was two to three times as high as among whites.[7] Intervenors contended that this difference in literacy rates was due to discrimination in the New York City school system. See *Gaston County* v. *United States,* 395 U.S. 285 (1969). The evidence demonstrated that predominantly non-white schools were inferior in numerous respects: the teachers had less training, the buildings were older and had fewer facilities, per capita expenditures were lower, class sizes were greater, special classes were less common and overcrowding more frequent.[8] On April 30, 1974, the district court granted intervenors' motion for summary judgment. This Court affirmed. 419 U.S. 888 (1974).

B. The Purpose of the Voting Rights Act

The 1972 district lines presented precisely the type of discriminatory effect which the Voting Rights Act was adopted to prevent.

The Voting Rights Act of 1965 abolished a variety of tests and devices which had theretofore been employed to prevent the registration of non-white voters, and authorized the use of federal registrars where local officials

[6] The United States, which had earlier moved to reopen the case because of *Torres* v. *Sachs,* 381 F. Supp. 309 (S.D.N.Y. 1974), did not itself move for summary judgment or support intervenors' motion therefor.

[7] See Motion to Affirm of Intervenors-Appellees, No. 73-1740, pp. 12, 2a-3a.

[8] *Id.,* pp. 10-11, 7a-9a. A portion of the documentary evidence involved is set out in the Appendix in No. 72-129, *NAACP* v. *New York,* pp. 93a-116a.

continued to refuse to register blacks or other minority groups. 42 U.S.C. § 1973b(a). But Congress recognized that even if non-whites were able to register and vote, election laws could be so fashioned as to harness white bloc voting to prevent the election of minority candidates. Congress was well aware that there were virtually no non-white elected officials in the jurisdictions covered by section 5, and that, in the absence of meaningful minority political strength, some white officials in those jurisdictions had in the past been openly indifferent to the interests of their non-white constituents. Congress therefore provided in 1965 that any new election laws adopted in covered jurisdictions would be subject to prior federal scrutiny under section 5 of the Voting Rights Act, in order to assure that such laws did not have the purpose or effect of vitiating minority voting strength.

In 1970, when Congress was considering renewing the Voting Rights Act for another five years, the application of section 5 to redistricting had become a major concern. The United States Commission on Civil Rights reported to Congress that, in the face of increasing minority registration, a number of jurisdictions had redrawn their district lines so that they "aggregated predominantly Negro counties with predominantly white counties [thus] preventing election of Negroes".[9] The effect of these lines was to divide up a predominantly black area and place the fragments in districts with white majorities.[10] During both the House and Senate hearings witnesses testified that the value of the newly won minority vote had been frequently diluted by district lines which "divide concentrations of

[9] United States Commission on Civil Rights, Political Participation, p. 177 (1968).

[10] *Id.*, pp. 31, 34-35. Congress expressly relied on this report in deciding to extend the Act. 116 Cong. Rec. 5521, 5526 (1970).

Negro voting strength" and thus "nullify local black majorities."[11] During the House and Senate debates repeated concern was expressed that the value of minority votes would be diluted by submerging them in districts with white majorities.[12]

By 1975 the most important impact of section 5 was on redistricting. During the years in which the Act had been in effect more than one-third of all the Attorney General's objections[13] were to redistricting; 58 plans in 9 states had been disapproved under section 5. Former Attorney General Katzenbach testified in 1975, "Section 5 has had its broadest impact . . . in the areas of redistricting and reapportionment. A substantial majority of the objections have been directed at this type of change. A redistricting plan or election system can be arranged so that a black candidate will have little chance of winning even with the full support of the black community. . . . Objections to this type of change, more than any other, have allowed blacks

[11] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., pp. 3, 17 (1969); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., p. 47 (1969-70).

[12] 115 Cong. Rec. 38486 (Remarks of Rep. McCulloch); 116 Cong. Rec. 5520-21 (Remarks of Senator Scott), 5527 (Remarks of Senator Scott), 6168 (Remarks of Senator Scott), 6358 (Remarks of Senator Bayh) (1970).

[13] S. Rep. No. 94-295, p. 18; H. R. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily ed., July 23, 1975); Rec. S 13669 (Remarks of Senator Kennedy (Daily Ed., July 24, 1975); Hearing Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 95 (Statement of Frank Parker), 582 (Statement of J. Stanley Pottinger) 121 Cong. Rec. S 13669 (Remarks of Senator Kennedy) (Daily Ed. July 24, 1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 170 (Statement of J. Stanley Pottinger) (1975).

to achieve a greater measure of political self-determination." [14] The Commission on Civil Rights, in an extensive report to Congress, stressed the large number of instances in which the application of section 5 had prevented the use of district lines which would have had the effect of discriminating on the basis of race.[15] Congress concluded that such redistricting had become the major tactic for effectively disenfranchising non-whites.[16]

The testimony before both House and Senate Committees revealed that discriminatory plans took two forms: (1) the minority community was divided among several predominantly white districts or, (2) where this was not possible because of the large number of minority voters, a single overwhelmingly non-white district was created and the remaining non-white voters divided among predominantly white districts.[17] Congress knew that the practice of the Attorney General under section 5 was to object to both forms of gerrymandering.[18] Senator Bayh, one of the sponsors of legislation to renew the Act, noted that a key consideration in appraising whether a redistricting plan had a discriminatory effect was or whether it would "afford minorities 'representation reasonably equivalent to their political strength' . . . . This means that where blacks are more than 40 percent of the population as in Richmond, section 5 requires a redistricting plan in which a comparable portion of the seats have substantial black majorities." [19] Professor Howard Glickstein, former staff director of the Civil Rights Commission, whose views were authoritatively described as reflecting the Senate "committee's interpretation of the legal standards for redistricting cases under section 5," [20] stated that "[T]o the extent that it is realistically feasible to draw a line which does not divide the minority community and thus does not dilute the value

---

[14] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975).

[15] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 204-319 (1975).

[16] S. Rep. No. 94-295, pp. 16-18; H. R. Rep. No. 94-196, pp. 10, 18-19, 77-8, 99; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily Ed. July 23, 1975); S 13668 (Remarks of Sen. Humphrey), S 13670 (Remarks of Sen. Kennedy) (Daily Ed. July 24, 1975); H 4708 (Remarks of Rep. Young), H 4710 (Remarks of Rep. Rodino), H 4712, H 4715 (Remarks of Rep. Edwards), H 4743 (Remarks of Rep. Roybal), H 4346 (Remarks of Rep. Jordan) (Daily Ed. June 2, 1975); H 4879 (Remarks of Rep. Badillo), H 4906 (Remarks of Rep. Conyers), H. 4910 (Remarks of Rep. Stokes) (Daily Ed. June 4, 1975); Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 16 (Statement of Senator Hart), 47, 51 (Statement of Clarence Mitchell), 75 92 (Statement of Arthur Flemming), 129, 142 (Statement of Frank Parker), 225 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 23, 26, 31 (Statement of Arthur Flemming) 331, 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 204-327, 343 (1975).

[17] Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 163-9, 180-86 (Mississippi Law Journal Article); 217 (Statement of Howard Glickstein) (1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 204-327 (1975).

[18] See e.g. Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 553 (Statement of J. Stanley Pottinger), 667 (Letter of J. Stanley Pottinger disapproving New York redistricting), 677-8 (Letter of J. Stanley Pottinger disapproving Arizona redistricting); 1038 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 252, 262 (Statement of J. Stanley Pottinger), 1205, 1212, 1213-1218, 1224, 1272, 1273, 1277, 1281 (U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After); 1505-10 (D. Hunter, Federal Review of Voting Changes) (1975).

[19] 121 Cong. Rec. S 13665 (Daily Ed., July 24, 1975).

[20] *Id.*

of minority votes, Section 5 requires that this be done . . . . [W]here the non-white population is so large that they will inevitably control at least one district, an attempt may be made to put as many non-white voters as possible in that one district so as to prevent substantial non-white concentrations in the surrounding districts. The application of Section 5 will prevent such overloading of one district . . . ." [21]

The use of such district lines, which divided up concentrations of minority voters and submerged them in predominantly white districts, is an important reason why there are still so few non-white elected officials in section 5 jurisdictions. Only a year ago the Civil Rights Commission observed that "white voters refuse to vote for black candidates solely because of their race".[22] The Commission noted that in a variety of areas, including New York City, literature had been used "which exploited the fear and frustrations of white urban dwellers toward minority group members".[23] These problems frequently made it

[21] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1039 (1975). See also S. Rep. No. 94-295, p. 18; H. R. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13340 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13400 (Remarks of Sen. Kennedy), S 13402-04 (Remarks of Sens. Byrd, Pastore, and Tunney) (Daily Ed., July 23, 1975), H 4756 (Remarks of Rep. Clay) (Daily Ed., July 2, 1975), H 4830 (Remarks of Rep. Kastenmeier) (Daily Ed., June 3, 1975); Hearings Before A Subcommittee of the State Judiciary Committee, 94th Cong., 1st Sess., 4, 11 (Statement of Rep. Rodino), 29 (Statement of Arthur Flemming), 642-3 (Statement of Armand Derfner) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 8 (Statement of Sen. Scott), 16-17 (Statement of Sen. Hart), 79, 98-99 (Statement of Arthur Flemming), 146 (Statement of Frank Parker), 226 (Statement of Howard Glickstein) (1975).

[22] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 155-56 (1975).

[23] *Id.*

impossible for a minority candidate to win election from a predominantly white district. The House and Senate reports noted that most minority officials in these areas had been elected from districts "with overwhelmingly black populations".[24] The Chairman of the Commission on Civil Rights testified:

> The presence of substantial black population does not ensure that blacks will be elected to office. For example, there are no blacks elected to any county office in the 191 of 260 counties with 25 to 50 per cent black population. . . . In 90 per cent of the counties in the population group, no blacks sat on county governing boards." [25]

Application of the Voting Rights Act, particularly where it prevented the fragmentation of a minority community into majority white districts, was regarded by Congress as a major cause of the modest increase in the number of minority officials which had occurred prior to 1975.[26] In 1975 Congress renewed the Act until 1982 in the hope that

[24] S. Rep. No. 94-295, p. 14; H. R. Rep. 94-196, p. 7.

[25] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 90 (1975).

[26] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 3-4 (Statement of Senator Bayh), 8 (Statement of Senator Scott), 13 (Statement of Senator Hart), 21 (Statement of Senator Kennedy), 47 (Statement of Senator Mitchell), 72 (Statement of Senator Mathias), 74, 82, 89-90 (Statement of Arthur Flemming), 108 (Statement of John Lewis), 121 (Statement of Nicholas Katzenbach), 224 (Statement of Howard Glickstein), 539, 586-7 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Rep. Rodino), 27 35-6, 41 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 330, 337 (Statement of Howard Glickstein) (1975).

it would substantially enlarge the opportunities for non-whites to be elected to public office.[27]

Congress in 1975 was also familiar with the facts of this case, which were used by the Commission on Civil Rights as an illustration of the way in which section 5 had been applied.[28] The decisions of the Attorney General in this case, objecting to the 1972 lines and approving the 1974 lines, were reprinted in both the House and Senate Hearings.[29]

Petitioners plainly disagree with the reasons which led Congress to renew the Act in 1970 and again in 1975; they insist that white bloc voting no longer exists, that

[27] S. Rep. No. 94-295, p. 14; H. R. Rep. No. 94-196, p. 7; 121 Cong. Rec. S 13337-9 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13668 (Remarks of Sen. Humphrey), S 13669 (Remarks of Sen. Kennedy) (Daily Ed., July 24, 1975), H 4712, H 4714, H 4717 (Remarks of Rep. Edwards), H 4756 (Remarks of Rep. Clay) (Daily Ed., June 2, 1975), H 4829 (Remarks of Rep. Collins) (Daily Ed., June 3, 1975); Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 3-4 (Statement of Sen. Bayh), 9 (Statement of Sen. Scott), 13 (Statement of Sen. Hart), 72 (Statement of Sen. Mathias), 89-90 (Statement of Arthur Flemming), 109 (Statement of John Lewis), 125 (Statement of Nicholas Katzenbach), 127-28, 141-42 (Statement of Frank Parker), 224 (Statement of Howard Glickstein), 539, 586-87 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Rep. Rodino), 21-22, 35-36 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 3330, 337 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 61-67, 337, 377-395 (1975).

[28] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 220-230 (1975).

[29] Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., pp. 252-260 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., pp. 667-676 (1975).

non-white candidates have an equal opportunity for election in any part of the country, that white elected officials are uniformly as opposed to discrimination as any non-white official would be, and that there is no possible manner in which district lines could have the effect of diluting the value of minority votes. P. Br. 29-42. Substantially similar arguments were unsuccessfully advanced by the appellants in *City of Petersburg* v. *United States*, 410 U.S. 962 (1973),[30] and by those who opposed extension of the Voting Rights Act in 1975.[31] Were it necessary for the Court to inquire into the merits of these contentions, we believe that they could not be sustained; with regard to Kings County, for example, there is a clear pattern of white bloc voting and non-white candidates have only been elected from overwhelmingly non-white districts. See p. 25, infra. But there is no need for such an inquiry, for Congress has already resolved this matter by twice renewing the statute. Congress is, we would suggest, uniquely competent to make such an essentially political assessment of voter attitudes, the manipulability of district lines, and the other problems confronting minority candidates and voters. That assessment was made after extensive committee hearings, extended debate, and careful consideration

[30] In *Petersburg* the district court concluded that the annexation of a heavily white area by a city with a slight non-white majority would have a discriminatory effect in violation of section 5. Appellants contended that, regardless of the impact of the annexation on the outcome of the city's at-large elections, it could not be said to dilute the value of minority votes in any legally cognizable sense. Jurisdictional Statement, No. 74-865, pp. 22, 23, 25; Brief For Appellant in Opposition to Motions to Affirm, No. 74-865, pp. 5-6.

[31] 121 Cong. Rec. H 4744-45 (Daily Ed., June 2, 1975), S 13325-26, 13344, 13357 (Daily Ed., July 22, 1975), S 13378 (Daily Ed., July 23, 1975), S 13589-92 (Daily Ed., July 24, 1975); Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., pp 645, 683, 710-11 (1975).

of the lengthy report of the Commission on Civil Rights. Congress has also recognized that the factual situation to which the Voting Rights Act is addressed may well change; it has therefore provided that the Act must be renewed from time to time to assure a periodic reevaluation of the relevant circumstances. See *Oregon* v. *Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, *J.* concurring and dissenting).

The congressional findings which underlie the renewal of the Voting Rights Act should be accepted by this Court. The courts are singularly ill equipped to reconsider on a nationwide basis the political and social realities which were well known to Congress. Petitioners offer little more than abstract argument to support their contention that the problems found by Congress do not, or at least should not, exist. Congress was doubtless aware of the fact, greatly stressed by petitioners, that in some instances, largely outside section 5 jurisdictions, non-white candidates had been elected by predominantly white constituencies. Congress was justified, however, in concluding that this salutary development did not necessarily signal the arrival of the millennium. If petitioners believe that the problems which led to the adoption of section 5, have, at least as regards redistricting, abated, that contention should be made to Congress.

C. The Decision of the Attorney General

On January 4, 1974, the District Court for the District of Columbia rescinded New York's exemption from the Voting Rights Act and directed New York to submit its 1972 districting plan to the Attorney General forthwith. That plan was submitted on February 1, 1974. Under the regulations promulgated by the Attorney General any interested member of the public was able to comment on the proposed submission. 28 C.F.R. § 51.12. Because of the

unusual amount of publicity which surrounded the submission,[32] the Department of Justice received a substantial amount of such commentary. Both intervenors and the State of New York submitted detailed memoranda regarding the 1972 plan, App. 202-235, 248-256, and numerous public officials wrote to the Attorney General to express their views. App. 237-247. The record in this case is silent as to whether petitioners or their counsel made any oral or written representations to the Attorney General regarding the 1972 lines. See App. 88.

On April 1, 1974, the Attorney General entered an objection to the Senate, Assembly and Congressional lines in Kings County (Brooklyn), and the Senate and Assembly lines in New York County (Manhattan). No objection was made to the Congressional lines in New York County or to any of the lines in Bronx County. The Attorney General concluded that the Kings County lines had precisely the configuration which Congress had intended to prohibit; a small area at the center of the non-white community was placed in districts with virtually no whites, and the balance of the minority community was fragmented into small pieces where were paired with larger white areas in predominantly white districts. The letter of objection stated

> First, with respect to the Kings County congressional redistricting the lines defining district 12 and surrounding districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our analysis reveals none . . .

[32] See, e.g., New York Times, January 5, 1974, p. 1, col. 8.

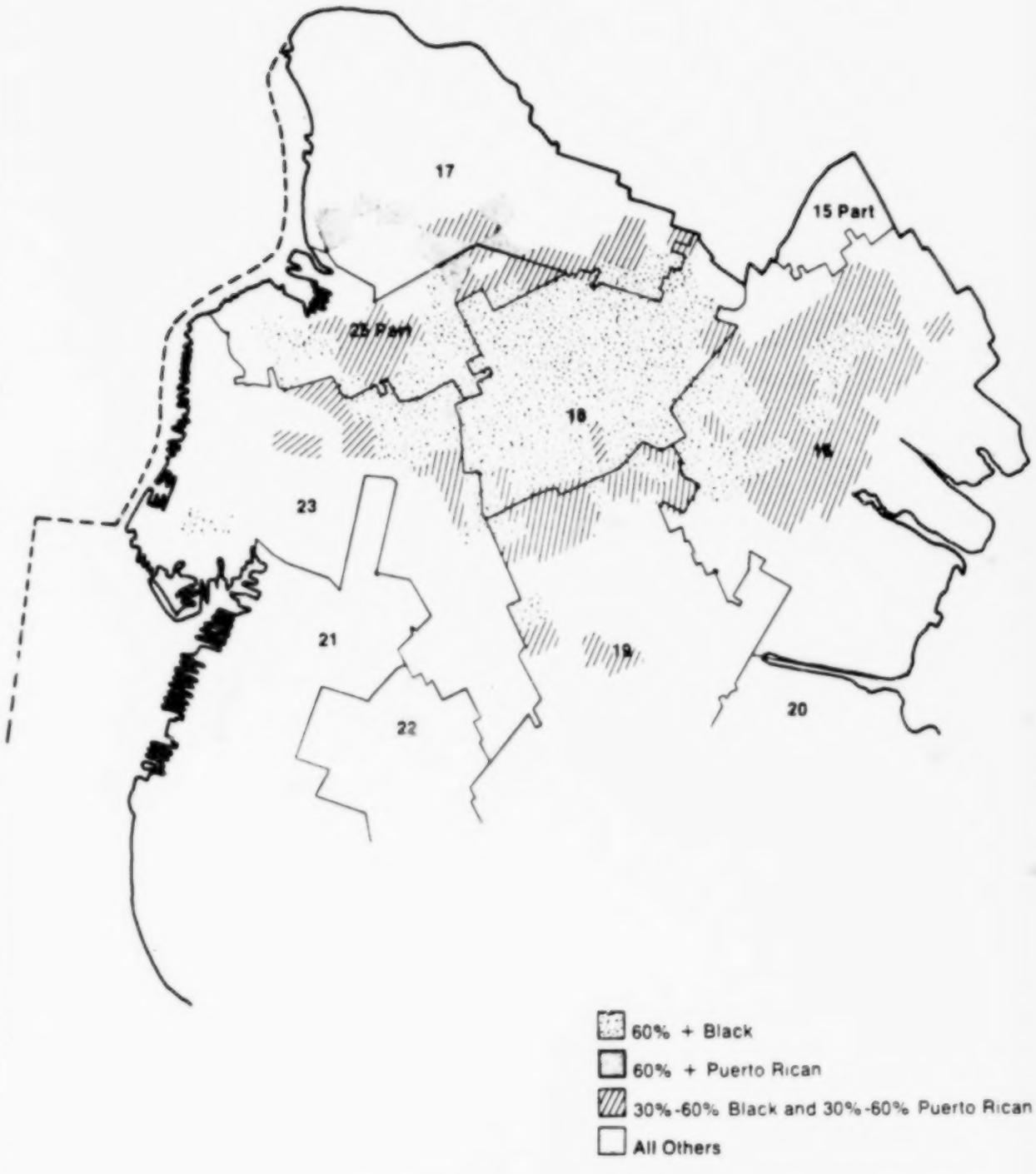
Similarly, in the Kings County Senate and assembly plans, a parallel problem exists. Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. App. 14-15.

The pattern found by the Attorney General is illustrated by the map of the 1972 Senate lines on the opposite page, reprinted from a report of the United States Commission on Civil Rights.[33] Petitioners did not question below the accuracy of the Attorney General's description of the fragmenting effect of the 1972 lines.

The record before the Attorney General fully justified his conclusion that New York had failed to establish that the 1972 lines had no discriminatory effect. The non-white community in Kings County is largely concentrated in a single contiguous area in central Brooklyn, in and around Bedford-Stuyvesant. App. 221. The 1972 lines, however, were drawn in such a way that a majority of non-whites in the county were placed in predominantly white Congressional and Senate districts. The bulk of the non-white community was divided up among 6 majority white Assembly districts, 5 majority white Senate districts, and 4 majority white Congressional districts. App. 222. Not a single white community of any size was in a majority non-white district. The number of non-whites in majority white

[33] The Voting Rights Act: Ten Years After, p. 223 (1975). The map significantly understates the size of the minority community. Since total non-white population is not indicated, areas up to 59% non-white appear as "all others" where neither the black nor Puerto Rican group exceeded 30%.

BROOKLYN, KINGS COUNTY



Map No. 1. The 1972 plan for Brooklyn senate districts concentrates much of the minority population in a few districts and divides the remainder among majority white districts.

districts vastly outnumbered the number of whites in non-white districts.

District	*Non-whites in Majority White Districts*	*Whites in Majority Non-white Districts*
Congressional	455,862	93,547
Senate	574,811	44,081
Assembly	361,707	135,260

App. 220. These figures contrasted with the situation in Bronx County, where the numbers of whites in predominantly non-white districts was only slightly smaller than the number of non-whites in predominantly white districts. Id.

This fragmentation of the minority community clearly affected the number of district with non-white majorities. The number of non-whites siphoned off from the Bedford-Stuyvesant ghetto was equal to the population of 2 Assembly districts, 2 Senate districts, or 1 Congressional district. App. 222. The proportion of districts with non-white majorities, and in which a non-white candidate would thus have a reasonable opportunity for election, was substantially smaller than the proportion of the County population that was non-white. App. 233.[34] The non-white districts in the center of the ghetto were substantially more compact than the predominantly white districts which paired portions of the minority community with larger white areas miles away. App. 224. Several leading black and Puerto Rican political leaders submitted detailed written statements to the Attorney General objecting to the division of the minority community and alleging that it was the result of deliberate racial gerrymandering "so that

[34] For example, non-whites constituted 35.6% of the County but only 11.7% of the Senate districts had a non-white majority.

the number of districts with Black and Puerto Rican majorities is kept to a minimum." App. 237-247.

The record before the Attorney General contained ample evidence of racially polarized voting. With the exception of the Borough President of Manhattan, who had run unopposed, not a single majority white district in the City of New York was represented by a Black or Puerto Rican. No Black or Puerto Rican had ever been elected to statewide or city-wide office. App. 212. Election results of races between white and non-white candidates showed a substantial correlation between the vote received by the white candidate and the white population of the area involved. App. 213-216.

This evidence led the Attorney General to enter an objection to district lines which clearly minimized non-white voting strength in Kings County. In the proceedings below petitioners did not question the accuracy of the evidence before the Attorney General, nor allege the existence of additional evidence with regard to the 1972 lines which he inexcusably failed to consider. Those of petitioners' witnesses who discussed the matter agreed that the fragmentation of a non-white community would have an "adverse effect" on minority voters, App. 32, 60, 67, and one of those witnesses testified that "blacks and Puerto Ricans had been gerrymandered in the past." App. 62.

D. Absence of Discriminatory Effect

Following the Attorney General's objection to the 1972 lines, New York declined to seek to validate those lines through further litigation, but chose instead to adopt new district lines which would be free of the defects which tainted the 1972 plan.[35] On May 29 and 30, 1970, the Legis-

[35] New York could have brought suit in the United States District Court for the District of Columbia to obtain a declaratory judg-

lature adopted new Assembly, Senate and Congressional lines in Kings County and new Assembly and Senate lines in New York County. These new lines substantially reduced the fragmentation of the minority community, increased the number of predominantly non-white districts, and roughly equalized the number of whites in majority non-white districts and the number of non-whites in predominantly white districts. The Attorney General approved these 1974 lines on July 1, 1974. App. 282-302.

The 1974 lines did not have the effect of discriminating against whites. Kings County is clearly not a county in which whites have been "excluded from participation in political life" or been "effectively removed from the political process." *White* v. *Regester*, 412 U.S. 755, 769 (1973). Whites constitute 64.9% of the county population; under the 1974 redistricting plan they are a majority of 68.6% of the Assembly districts and 70.0% of the Senate districts. Among the officials elected under the 1974 lines, 77.2% of the Assemblymen are white and 80% of the Senators are white. The 1974 redistricting resulted in five new districts in which non-whites were for the first time a majority; in the succeeding election white candidates won the elections

ment that the 1972 lines did not have a discriminatory purpose or effect. In view of the Attorney General's expertise, and his application of the same standards applied in court, few jurisdictions have chosen to pursue such litigation. In the first 10 years of the Act, the Attorney General interposed 163 objections. Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., p. 185 (1975). The submitting authority has only sought to challenge that determination in three instances. *City of Petersburg* v. *United States*, 410 U.S. 962 (1973); *Beer* v. *United States*, No. 73-1869; *City of Richmond* v. *United States*, 422 U.S. 358 (1975) (Although Richmond initially sought to overturn the Attorney General's decision objecting to annexation as such, it subsequently conceded the correctness of that decision; the bulk of the litigation dealt with a dispute between Richmond and certain intervenors as to which ward plan should be adopted).

in four of these.[36] The four officials elected on a countywide basis are all white,[37] as are the Democratic and Republican County Chairmen. There is no history in the county of disproportionately low levels of white education, employment, registration or voting. Compare *White* v. *Regester*, 412 U.S. at 768.

The 1974 lines did not have the effect of "maximizing" the number of districts in which non-white candidates were assured of election. With regard to the Congressional and Assembly lines the number of non-white legislators elected under the 1972 and 1974 lines was unchanged. It clearly would have been possible to draw lines more favorable to non-whites. The minority population of the 14th Congressional district, which now as before is represented by a white, could have been substantially increased; the Attorney General expressly declined to insist that this be done. App. 294-297. The minority population of the 57th Assembly district could as readily have been raised from 65.0% to 80.4%, but the Legislature chose not to do so. Compare App. 122-23 with App. 277.

Petitioners do not assert that, because of their religion or ancestry, they should enjoy rights not accorded to other whites. P. Br. 6, n. 6. One group of amici, however, do urge that, because of the persecution of the Hassidim in Europe during World War II, these whites are different from all

[36] The 57th and 59th Assembly districts, 17th and 23rd Senate districts, and the 14th Congressional district.

Whites are a majority of 16 Assembly districts, numbers 38, 39, 40-52, and 58, and of 7 Senate districts, 15, 16, 19-22, and 25. Non-whites are a majority of 7 Assembly districts, numbers 40, 53-57, and 59, and of 3 Senate districts, 17, 18 and 23, App. 179-80, 195. Whites represent all the majority white districts as well as Assembly districts 57 and 59 and Senate districts 17 and 23.

[37] Borough President, District Attorney, and two City Councilmen.

other whites.[38] Regardless of whether the state could take into consideration that history of persecution in fashioning laws which might help to overcome the lingering effects of those tragic events, such a policy is not constitutionally required, and cannot be relied on to avoid the state's responsibilities under the Voting Rights Act.

Petitioners do not claim that the 1974 lines so emasculated white voting strength in Kings County as to violate *White* v. *Regester*, 412 U.S. 755 (1973). Their objection is solely to the purpose which motivated the Legislature to draw these particular lines. Had the 1974 district lines, or the division of the Hassidic community, been the result of "racially neutral" criteria, such as shaping the most compact contiguous districts, petitioners presumably would not question the validity of such lines.

E. Cause of the Alleged Injury

On June 11, 1974, petitioners commenced this action in the United States District Court for the Eastern District of New York. They alleged that the 1974 Senate and Assembly lines had divided the Hassidic community in Williamsburgh and thus "diluted" the voting power of the Hassidic plaintiffs. App. 11. The exclusive cause of this division was asserted to be that the Legislature, in drawing those lines, had sought to assure that at least 65% of the residents of certain districts were non-white. App. 10. The use of such a "quota", or any other consideration of race, was alleged to be unconstitutional. App. 11. Both the district court and the court of appeals held that New York could constitutionally consider the racial composition of the 1974 lines in fashioning a remedy for the discriminatory 1972 lines. Neither court, therefore, found it necessary to

[38] Brief Amicus Curiae of Board for Legal Assistance to the Jewish Poor, pp. 34, 50-52.

decide whether the alleged "quota" was in fact the cause of the alleged harm to petitioners.

The only injury of which petitioners complain is that their community, although wholly within a single congressional district, is divided between two Senate districts and two Assembly districts. P. Br. 13, 24; App. 11, 46, 67, 260-261. Although alleging that the congressional lines were fashioned in the same manner as the Senate and Assembly lines, petitioners do not seek to overturn the former since they are located entirely within a single congressional district. Petition, p. 18a, n. 10. The petitioners in the district court expressly disclaimed any concern with whether the district in which they were placed had a non-white majority, so long as the entire Hassidic community was in a single district. App. 46, 83, 87. Petitioners maintain that the sole reason the Hassidic community was divided in half was because of the alleged 65% rule. P. Br. 24; App. 11, 261.

The record, however, clearly demonstrates that the division of the Hassidic community was *not* caused by the alleged quota. Under the present plan the community is divided between the 57th Assembly District, with a 65% non-white population, and the 56th Assembly District, with an 88.1% non-white population. App. 195. Mr. Scolaro, the Executive Director of the Joint Legislative Committee on Reapportionment, testified that it would have been possible to keep the Hassidic community intact by placing it in the 56th district:

> Q. Now, did you consider putting the entire Hassidic community in the 56th Assembly district?
>
> A. That was one variable that we came up with, yes, and that would require a moving of a portion of the Hassidic community which is presently in the

57th district, totally into the 56th district, and that would have resulted, to the best of my knowledge, in two districts, both of which would be over 65 percent non-white.

App. 122. Intervenors introduced in the district court a plan drawn in the manner described by Scolaro, which would have placed the entire Hassidic community in a single district without violating any 65% rule. App. 270-278. Similarly, Scolaro testified it would have been possible to draw Senate lines which placed the entire Hassidic community in a single district while complying with the alleged 65% requirement:

Q. Would it be, would it have been or would it be possible to redraw the Senate lines so that the entire Hassidic community was within a single Senatorial district and still comply with the 65 percent requirement?

A. You are dealing with such a large number in the Senatorial district, 304,000 people, that I am sure there would be a way. . .

App. 124.[39]

The actual reason for dividing the Hassidic community, at least with regard to the Assembly districts, was a desire to minimize the number of whites who would be in a heavily non-white district. Scolaro stated, with regard to placing the entire community in the 56th Assembly district:

[39] Plaintiff's Motion for Summary Judgment asserted that there was no genuine issue as to whether the 65 percent rule was the sole reason for dividing the community. App. 261. Intervenors' Statement of Material Issues as to Which There is a Genuine Dispute expressly controverted that contention, and referred to Scolaro's testimony. App. 279-280.

A. The only white community in this whole community would be the Hassidic Jewish community, there would be no other whites.

Q. But, Mr. Scolaro, in hindsight, it would have been possible under that scheme to both comply with the Justice Department 65 percent standard, if that was their standard, and keep the Hassidic community together?

A. Yes, sir, but it was my judgment in trying to apply the Department of Justice overall criteria that that would definitely make no representation for the Hassidic community at all and that it would be such a minority group in an overwhelmingly black area that they would have not had any representation. They would compose approximately 25,000 people out of 121,000 people and 90,000 of those 121,000 or more would be black.

App. 121-122. This testimony is supported by evidence presented to the Attorney General that the 1972 lines were also drawn so as to avoid placing whites in majority non-white districts. App. 218-224. Although Scolaro suggested this division of the Hassidic community was in its best interest, the petitioners obviously believe otherwise.

This critical failure of proof requires dismissal of this action, regardless of whether there was a 65% "quota" or whether such a "quota" would be constitutional. The quota which petitioners seek to attack simply is not the cause of their injury. *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Petitioners remain free, if they wish, to seek to consolidate their community in the 56th Assembly district by commencing a new action challenging the constitutionality of Scolaro's desire to avoid placing Hassidim in a heavily non-white district.

ARGUMENT

Petitioners advance three arguments in support of their contention that the 1974 district lines are unconstitutional: (1) that in adopting election laws, even to remedy past discrimination, a state must close its eyes to the racial impact of the proposed legislation, (2) that the Attorney General's decision of April 1, 1974, provides no basis for the 1974 plan since there was no authoritative finding that the 1972 plan had a discriminatory purpose, and (3) that the Legislature used an impermissible "quota" in fashioning the 1974 lines. We examine each of these grounds in turn.

I.

The New York Legislature Was Obliged to Take Into Account the Racial Composition of the Affected Districts in Drawing the 1974 District Lines.

Petitioners' first, and most broadly stated, contention is that "there is *never* any justification for race-consciousness in the electoral process", not even " 'to undo the effects of past discrimination' or to prevent its 'perpetuation.' " P. Br. 21. Petitioners do not attempt to argue that taking account of race in fashioning remedies for past racial discrimination is constitutionally impermissible across the board. They necessarily concede that, in fashioning remedies for racial discrimination in other sectors of American life, both this Court and numerous lower courts have concluded that race must be considered.[40] Petitioners

[40] This Court mandated such consideration to formulate an effective remedy for school segregation in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), and *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1974) and for discrimination in faculty assignments, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). The lower courts have done so in such diverse areas as urban renewal, public housing, employment and jury selection. *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Gautreaux* v. *Romney*, 448 F.2d 731 (7th Cir. 1971); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Hoyward* v. *Public Housing Administration*, 238 F.2d (5th Cir. 1956); *Boston N.A.A.C.P.* v. *Beecher*, 504 F.2d 1017, 1026-27 (1st Cir. 1974); *Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053, 1056, *cert. denied* 419 U.S. 895 (1974); *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir.) *cert. denied* 406 U.S. 950 (1972); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966).

do not, of course, deny that it is usually imperative to know the race of the persons affected in order to determine whether a challenged practice is discriminatory in nature.

In scrutinizing both the 1972 and 1974 district lines the Attorney General could not assess whether they minimized minority voting strength and thus had a discriminatory effect without knowing the racial composition of the districts involved. The applicable regulations require the submitting authority to furnish the Attorney General with the "population distribution by race within the proposed units" and, where available, with the "[v]oting age population and the number of registered voters" by race in the districts involved. 28 C.F.R. §51.10(b)(5)-(6). In both *City of Petersburg* v. *United States*, 410 U.S. 962 (1973) and *City of Richmond* v. *United States*, 422 U.S. 358 (1975), this Court was required in assessing the effect of a proposed annexation to consider the racial composition of both the original city and the area to be annexed, in order to determine whether the annexation "would create or perpetuate a white majority in the city." 422 U.S. at

368.[41] Petitioners do not, of course, contend that the constitution directs the Attorney General to ignore the racial composition of districts whose effect on minority voters he is obligated to scrutinize.

In fashioning its 1974 districting plan, the New York Legislature was not obligated to close its eyes to the very facts which it was required to disclose to the Attorney General and which the Attorney General was compelled to consider in reviewing that plan. Just as the racial compositions of the 1972 districts had been considered in determining whether the 1972 lines violated section 5 of the Voting Rights Act, "so also must race be considered in formulating a remedy." *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971). It would have been irresponsible for New York to have adopted a series of district plans at random, without regard to whether they minimized minority voting strength, until it stumbled across a plan without the forbidden effect. Petitioners do not suggest New York should have enacted plans at random, nor do they suggest any other way in which the state could have remedied the defects of the 1972 lines. To correct a districting plan which has the effect of unlawfully minimizing minority voting strength, a redistricting plan must take into account the perceived illegality.

[41] *Georgia* v. *United States*, 411 U.S. 526 (1973), furnishes another example of the "race-consciousness" required in a Section 5 proceeding. To facilitate its evaluation of a 1971 Georgia reapportionment proposal, "The Justice Department asked for census maps of the 1964 and 1968 House districts; the distribution of white and non-white populations within the 1964, 1968, and 1971 districts; a history of the primary and general elections in which Negro candidates ran; data, including race, with respect to all elected state representatives; and the legislative history of all redistricting bills." *Id.* at 529 n. 4. This Court observed that "There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to Section 5 evaluation of the submitted reapportionment plan." *Id.* at 540.

The success of the new plan can only be measured by the extent to which it remedies the illegal fragmentation of racial minorities. To require a state to ignore the racial distribution of the affected populace would be to frustrate any good faith effort to comply with section 5; to forbid the Attorney General in appraising a proposed plan to consider that distribution would be to frustrate, not only the vital objective which Congress sought to achieve in adopting and twice re-enacting the Voting Rights Act of 1965, but also the constitutional policies which underlie the Act.

This common sense view of the state's responsibility in fashioning a remedy for the discriminatory 1972 lines corresponds with the understanding of Congress. In a memorandum submitted to the Senate Subcommittee on Constitutional Rights in May of 1975, when that Subcommittee was considering legislation to extend the Voting Rights Act, Professor Howard A. Glickstein, formerly Staff Director of the United States Commission on Civil Rights, stated:

> Obviously, in order for local officials to evaluate the potential discriminatory effects of the redistricting plans they draft, it is necessary that they take into account the racial makeup of each of the districts. Otherwise, it would be impossible to assess the impact of redistricting plans which are subject to the Section 5 standards.[42]

On July 24, 1975, in the course of Senate debate on the bill shortly thereafter enacted to extend the Voting Rights Act, Senator Bayh referred to Professor Glickstein's pres-

[42] Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., First Sess. 1039 (1975).

entation as embodying "the committee's interpretation of the legal standards for redistricting cases under Section 5." P. 15, n. 20, *supra*.

A recent example of the way in which local officials, the Attorney General, and this Court all "take into account the racial makeup of each of the districts" in fashioning a remedy is *City of Richmond* v. *United States*, 422 U.S. 358 (1975). There the City of Richmond had proposed to annex a predominantly white area which would have reduced the black population of the City from 52% to 42%, thus significantly lessening black voting strength in at-large City Council elections. The Attorney General objected to the annexation on the ground that it thus had a discriminatory effect, but suggested that this defect might be overcome by an appropriate single-member district plan. 422 U.S. at 364. Richmond thereupon adopted a single-member district plan designed to overcome the discriminatory impact of the annexation itself, which was approved by both the Attorney General and this Court. In sustaining Richmond's plan this Court pursued exactly the sort of inquiry into the racial composition of the proposed districts which petitioners contend is constitutionally impermissible:

> We are also convinced that the annexation now before us, in the context of the ward system of election finally proposed by the city and then agreed to by the United States, does not have the effect prohibited by Section 5. The findings on which this case was decided and is presented to us were that the post-annexation population of the city was 42% Negro as compared with 52% prior to annexation. The nine-ward system finally submitted by the city included four wards each of which had a greater than 64% black majority. Four wards were heavily white. The ninth had a black population of 40.9%. In our view, such a plan does not under-value the black strength in the community after annexation; and we hold that the annexation in this context does not have the effect of denying or abridging the right to vote within the meaning of Section 5. 422 U.S. at 371-72.

Absent the remedial "race-consciousness" of the Richmond City Council, the Attorney General and this Court, the vital purposes of the Voting Rights Act—and of the Fourteenth and Fifteenth Amendments, which the Act is designed to implement—could not have been faithfully carried out.

II.

The Decision of the Attorney General Was Lawful and Required New York to Remedy the Minimization of Minority Voting Strength Which Tainted the 1972 District Lines.

Petitioners expressly recognize that, as the court below held, the correctness of the Attorney General's decision cannot be challenged by an attack on the resulting remedy. P. Br. 51; Petition, p. 9, n. 3. The record before the Attorney General left little doubt that the 1972 district lines had minimized minority voting strength. See pp. 20-25, *supra*. Petitioners maintain, however, that even if the decision was correct, it did not warrant the enactment of any remedy. Petitioners object that the decision was insufficient to justify any remedy, because (1) it rested on the state's failure to meet its burden of proving that the 1972 lines were not discriminatory, (2) it contained no finding or discussion as to the purpose of the 1972 lines, and (3) it did not purport to conclude that the 1972 lines were unconstitutional.

Petitioners are, of course, right in noting that the Attorney General's decision was cast in the form of a conclusion that New York had not sustained its burden of proving that the 1972 lines did not have a discriminatory effect. But petitioners' argument that a finding in this posture was ineffective to require New York to undertake remedial action is wholly unavailing. The applicable regulations clearly require the Attorney General to disapprove a submission where the submitting authority fails to meet this burden of proof. 28 C.F.R. §51.19.[43] This Court in *South Carolina* v. *Katzenbach,* 382 U.S. 301, 335 (1966), expressly recognized that in section 5 actions brought in the District Court for the District of Columbia by a state or local government seeking approval of a new law the Voting Rights Act places "the burden of proof on the areas seeking relief." In *Georgia* v. *United States,* 411 U.S. 526 (1973), this Court upheld the validity of the regulation adopted by the Attorney General imposing the same burden of proof on those submitting jurisdictions which elect to pursue the section 5 alternative of preclearance by the Attorney General. 411 U.S. at 536-39.

It is true that in *Georgia* v. *United States* three members of this Court dissented. 411 U.S. at 542-45. But only last year Congress voted to extend the Voting Rights Act without altering section 5 in this regard. In 1975 Congress took express note of this Court's decision in *Georgia* v. *United States*[44] and of the existence of the regulation in

[43] "If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

[44] H.R. Rep. No. 94-196, 94th Cong. 1st Sess., pp. 9-10; S. Rep. No. 94-295, 9th Cong. 1st Sess., pp. 16-17.

question,[45] and must be deemed in renewing the Act to have approved both. Indeed, the letter of the Assistant Attorney General disapproving the 1972 lines in this very case was itself referred to during, and reprinted with, the 1975 House and Senate Hearings.[46] Congress also knew that it is the general practice of the Attorney General, mindful of the sensitivities of the local officials involved, to phrase objection letters in terms of a failure to meet a burden of proof, rather than making an express finding of discriminatory effect.[47] Congress "had ample opportunity to amend the statute"; its failure to do so compels the conclusion that *Georgia* v. *United States,* had "correctly interpreted the Congressional design." *Georgia* v. *United States,* 411 U.S. at 526.[48]

[45] S. Rep. No. 94-295, p. 16 (1975); H. R. Rep. No. 94-196, p. 8 (1975). The Regulations were reprinted in both the House and Senate Hearings. Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess. pp. 186, 192 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong. 1st Sess., pp. 601, 607 (1975).

[46] Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., p. 252 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 667 (1975).

[47] Counsel for Intervenors have reviewed over 100 objection letters entered by the Attorney General during the last four years. In virtually every case the Attorney General phrased the letter as a holding that he was "unable to conclude" that the submission would not have a discriminatory effect, rather than as a holding that the submission would indeed have such a discriminatory effect. The letters are a matter of public record and are on file in the Voting Rights Section of the Civil Rights Division.

[48] In *Allen* v. *State Board of Elections* this Court construed section 5 to cover "any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, 566 (1969). When Congress renewed section 5 in 1970 without change this Court concluded that such renewal confirmed the correctness of its decision in *Allen,* and thus applied section 5 to redistricting in *Georgia* v. *United States.*

Petitioners also attack the sufficiency of the Attorney General's decision on the ground that it contained no finding as to the purpose of the 1972 lines.[49] P.Br. 10, 42-43. But section 5 of the Voting Rights Act is not limited in its application to election laws that are motivated by racial malice. The Act requires that, prior to the enforcement of a new election practice or procedure, the state must prove that it "does not have the purpose and will not have *the effect* of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (Emphasis added). The regulations promulgated by the Attorney General in carrying out section 5 also require the state to establish that the submitted law "does not have a discriminatory purpose or effect." 28 C.F.R. § 51.19. In *City of Richmond* v. *United States,* 422 U.S. 358 (1975), this Court recognized that section 5 forbids both discriminatory purpose and discriminatory effect and dealt with those issues separately.

Professor Glickstein's Memorandum stated that "when any of these jurisdictions decide to alter their district lines, section 5 places the burden on them of proving that their redistricting plans have neither the purpose *nor effect* of racial discrimination. The Attorney General looks principally to the potential effects of redistricting plans in making his section 5 determinations . . . ." [50] (Emphasis in original). Virtually all of the objections entered by the Attorney General since 1965 have been based on the effect of the proposed law, rather than its purpose.[51] As this Court

[49] This argument appears to have been unsuccessfully advanced in *City of Petersburg* v. *United States,* 410 U.S. 962 (1973). See Jurisdictional Statement, No. 74-865, pp. 13, 23, 23-24, nn. 10, 29.

[50] Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 1039 (1975).

[51] See n. 47, *supra.* Counsel have been able to identify only a single instance in which the Attorney General based an objection on a discriminatory purpose. Letter of J. Stanley Pottinger to Luther L. Britt, June 2, 1975.

noted in *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 462 (1972), "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." [52]

Petitioners urge, finally, that New York could not fashion a remedy for any defects in the 1972 lines unless those defects constituted violations of the Fourteenth and Fifteenth Amendments as defined in *White* v. *Regester,* 412 U.S. 755 (1973).[53] But this contention depends in its entirety on treating as a legal nullity the Attorney General's decision that the 1972 lines violated section 5 of the Voting Rights Act. Once the Attorney General determines that a redistricting plan transgresses the statutory standard established by the Voting Rights Act, the question whether the plan also transgresses constitutional standards has no independent legal significance. Section 5 was deliberately adopted to set a more stringent statutory standard for redistricting plans than had theretofore been required under the Constitution alone. During the 1969-70 hearings on renewal of the Voting Rights Act, the Attorney General repeatedly testified that a ban on any "discriminatory purpose or effect" was broader than the unelaborated consti-

[52] Neither the Fourteenth nor Fifteenth Amendment purports on its face to be limited to acts of deliberate discrimination. In *Gray* v. *Sanders,* 372 U.S. 368 (1963) and its progeny, as in *White* v. *Regester,* 412 U.S. 755, 765-69 (1973), this Court struck down district plans as unconstitutional solely because of their effect. In other areas of the law the courts have come to focus primarily on the potentially adverse impact of a challenged practice, regardless of its purpose. See *Carmical* v. *Craven,* 457 F.2d 582, 587 (9th Cir. 1971) (jury selection); *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 931 (2d Cir. 1968) (urban renewal relocation); *Hobson* v. *Hansen,* 269 F.Supp. 401, 497 (D.D.C. 1967) (pupil assignments).

[53] The argument that the less stringent constitutional standards should be applied in section 5 cases was advanced, unsuccessfully, in *City of Petersburg* v. *United States,* 410 U.S. 962 (1973). See Jurisdictional Statement, No. 74-865, pp. 10, 23, 26.

tutional prohibition.[54] In 1975 Senator Bayh noted in the debate leading to the extension of the Voting Rights Act that "Section 5 is designed to go beyond the constitutional standard required by the 14th and 15th amendments and is justified as necessary to put a stop to the practice of gerrymandering districts or adopting at-large systems so that blacks rarely or never win elections." [55] Once a districting plan has been held defective under the stringent test established by section 5, those defects can and must be remedied regardless of whether the plan is constitutional.

Petitioners' contention is, as a practical matter, foreclosed by this Court's decisions in *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969) and *Georgia* v. *United States,* 411 U.S. 526 (1973). In *Allen* the plaintiffs sought to enjoin the use of certain new election laws in section 5 jurisdictions on the ground that the laws had not been approved by, indeed had not been submitted to, the Attorney General or the District Court for the District of Columbia. This Court held that use of the new procedures had to be enjoined, regardless of their merits, if such approval had not been obtained. The Court stressed that in directing the district courts to enjoin implementation of the laws involved it would not consider whether or not the changes have "a discriminatory purpose or effect . . . [W]e express no view on the merits of these enactments; we also emphasize that our decision indicates no opinion concerning their constitutionality." 393 U.S. at 570-71. In *Georgia* v. *United States* the United States sued to enjoin the use of

[54] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., p. 280 (1969); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., pp. 189-190 (1969-70).

[55] 121 Cong. Rec. S 13665 (Daily Ed., July 24, 1975).

new district lines; the lines had previously been submitted to and rejected by the Attorney General. The Court concluded that, since the new lines were covered by section 5 and lacked the requisite approval, their use must be forbidden. Again no inquiry was made, or warranted, into the merits of the plan. 411 U.S. at 541. In the instant case the failure of the Attorney General to approve the 1972 district lines made their use *per se* unlawful, and any attempt to hold elections using these lines would have been enjoined by an appropriate federal court without consideration of their constitutionality or the correctness of the Attorney General's decision. Since New York was thus precluded from using the 1972 lines, it follows *a fortiori* that New York was free, and indeed obligated, to adopt legislation remedying the defects in those lines.

The only significant difference between the Attorney General's objection in the instant case, and the dozens of objections entered by him in other reapportionment cases, is that the redistricting involved here occurred in a jurisdiction outside the South. Thus, petitioners insist that New York does not have the "history of official racial discrimination" that is common in southern cities like New Orleans. P. Br. 49. They urge that the only basis for applying the Voting Rights Act to New York is not any substantive problem with the state's literacy test, but only a minor difficulty regarding the right of Puerto Ricans to bilingual ballots. P. Br. 47. Petitioners contend that white bloc voting cannot be present here since blacks have won elections in white areas of California, Massachusetts, and other northern states. P. Br. 32-33. Intervenors maintain these contentions are factually incorrect. The problems of racial discrimination in New York City, though more subtle than in other states, are equally serious, and the federal courts

have been compelled to deal with them in elections,[56] public employment,[57] private employment,[58] and school segregation.[59] Rescission of New York's exemption from Voting Rights Act was successfully sought in 1974 on the grounds that its literacy test had had the same discriminatory impact on non-whites in New York as had literacy tests in the South. See pp. 9-11, *supra*. The presence of white bloc voting against non-white candidates in New York is regrettably clear. See pp. 24-25, *supra;* App. 212-217.

More fundamentally, the Voting Rights Act was not intended as a form of regional legislation, applying only to the South. The formula in section 4 literally covers the entire country, and Congress modified that provision in 1970 for the express purpose of applying section 5 to New York. *N.A.A.C.P.* v *New York,* 413 U.S. 345 (1973). To adopt the distinctions urged by petitioners would be to render the Voting Rights Act a provision of "merely regional application". *Keyes* v. *School District No. 1,* 413 U.S. 189, 219 (1973) (Powell, J., concurring and dissenting).

---

[56] See, e.g., *Coalition For Education* v. *Board of Elections,* 370 F.Supp. 42 (S.D.N.Y. 1974), aff'd 495 F.2d 1090 (2d Cir. 1974).

[57] See, e.g., *Chance* v. *Board of Examiners,* 458 F.2d 1167 (2d Cir. 1972); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387 (2d Cir. 1973).

[58] See, e.g., *Patterson* v. *Newspaper and Mail Deliverers' Union,* 514 F.2d 767 (2d Cir. 1975); *Rios* v. *Enterprise Association Steamfitters,* 501 F.2d 622 (2d Cir. 1974).

[59] See, e.g., *Hart* v. *Community School Board,* 383 F.Supp. 699 (E.D.N.Y. 1974), aff'd 512 F.2d 37 (2d Cir. 1975).

III.

The 1974 District Lines Were An Appropriate Remedy.

The appropriateness of the 1974 lines as a remedy for the discriminatory effect of the 1972 lines depends on the precise nature of the unlawful aspects of those earlier lines. The record before the Attorney General revealed three related problems. (1) The bulk of the compact and contiguous non-white community had been fragmented into small pieces which were paired with larger white areas in majority white districts. (2) The number of non-whites in majority white districts was several times higher than the number of whites in majority non-white districts. (3) The proportion of districts in which a non-white candidate would have a reasonable opportunity to win election was substantially lower than the proportion of the county population which is non-white. These problems are, as a practical matter, so interrelated that a solution to one would tend to solve the others as well.

In assessing whether any or all of these defects had been overcome by the 1974 lines, both New York and the Attorney General had to know for each district whether a majority of the eligible voting age population was white or non-white. 28 C.F.R. §51.10. Without this information they could not determine whether a particular portion of the non-white community was in a majority white or majority non-white district, whether a non-white candidate would stand a reasonable chance of election in a particular district, or whether the number of non-whites in majority white districts greatly exceeded the number of whites in majority non-white districts.

But the 1970 Census was conducted in such a way as to make it impossible to determine readily the white or

non-white eligible voting age population of a proposed district. The available census data presents three distinct problems. First, the proportion of the total white population in Kings County which is of voting age is approximately 20% higher than the proportion of the total non-white population which is of voting age. App. 263. Second, because of a problem of double counting, there is uncertainty as to the racial composition of the total population of each district. The Census Bureau has devised two different methods of calculation: the "February Formula," which is a high estimate of the minority population, and the "January Formula," a lower projection. The actual figure lies somewhere in between. App. 265-268. Thus under the 1972 lines the 57th Assembly district was 61.2% non-white according to the February Formula and 50.3% according to the January Formula. App. 265-68. Third, these problems are compounded by the fact that the mobility rate among non-whites in Kings County is higher than among whites, so that a greater proportion of the former are ineligible to vote in primary elections because of New York's unusual residence requirement. App. 264;[60] *Rosario* v. *Rockefeller,* 410 U.S. 752, 759, n. 9 (1973). Both New York and the Attorney General were aware of these problems.[61]

The figures used by the Legislature in the preparation of the 1974 lines were February Formula estimates not adjusted for differences in age distribution or mobility. The factual problem which confronted both the Attorney General and the Legislature was to estimate what level

[60] The columns in this table are incorrectly headed. The left column is the white population and the right column is the non-white population.

[61] See App. 98, 102, 219.

of unadjusted February Formula minority population corresponded to a 50% non-white eligible voting age population. Under the circumstances it was reasonable to conclude that a district in which the white and non-white eligible voting age populations were equal would have an unadjusted February Formula non-white total population in excess of 65%. Petitioners did not assert in the courts below that this statistical inference was inaccurate.

For the reasons set out in part I of our argument it was not only possible but imperative for New York and the Attorney General, in considering whether proposed districts were free from the discriminatory defects of the 1972 lines, to know for each district whether whites or non-whites were a majority of the eligible voting age population. It is somewhat unclear precisely what statistical approach was used by New York to determine the voting age majority of a district. Petitioners urge there was a rigid 65% rule, but the new congressional district was less than 65% non-white, App. 179. Moreover, the report of the Joint Legislative Committee states merely that the total population non-white majority should be "substantial." App. 179. The United States expressly denies having taken any position as to what size non-white total population majority was comparable to equal voting age population.[62]

In sum, the record does not demonstrate with certainty the exact statistical assumption underlying the 1974 lines. But the 1974 lines did substantially undo the discriminatory effect of the 1972 lines. Under the 1974 district lines the fragmentation of the minority community was significantly reduced. The number of districts in which the non-white eligible voting age population was at least equal to the white eligible voting age population, and in which a

[62] Brief For the United States In Opposition, p. 7.

non-white candidate would thus have a reasonable opportunity to win election, was increased. The number of non-white voters in predominantly white districts was lowered to a level roughly equal to the number of whites in predominantly non-white districts.

Petitioners and the dissenting judge in the court of appeals assail the alleged 65% "quota" as a device to assure non-white domination of the new districts or to guarantee non-white control while not "wasting" unnecessary minority voters.[63] Such a device, whatever its constitutionality, is not present here. Any 65% standard, if indeed one was utilized, was only a guideline for projecting when white and non-white eligible voting age populations were equal and the resulting district would be one in which non-white candidates would enjoy a reasonably equal opportunity to win election to public office. It certainly did not guarantee non-white domination or control. Non-white candidates were defeated in four of the five new districts; the only district which elected a non-white candidate was the 23rd Senate district whose total population was 71.1% non-white. App. 180. Petitioners urge that it would be unconstitutional to go beyond lines that were "racially fair" to maximize non-white representation as a means of compensation for some past wrong. P. Br. 36-38. Whatever the validity of such a hypothetical plan, those simply are not the facts of this case. Both the intervenors in opposing the 1972 lines, App. 231, and the Attorney General in approving the 1974 lines, App. 298, disclaimed any intent to maximize non-white representation. The Attorney General insisted:

> [T]he Voting Rights Act does not guarantee that any particular candidate be elected. . . . What it does do is assure that the *opportunity* of the affected minorities to participate freely in the electoral process, and thus elect a candidate of their choice, should not be unlawfully abridged. . . . The law does not require the state to "maximize" minority voting strength. . . .

App. 298 (emphasis added).

[63] Petition 32a-50a; P.Br. 54-55.

Non-whites do not enjoy excessive political power under the 1974 lines. Non-whites are 35.1% of the population, but under the 1974 plan they constitute a majority in only 31.4% of the Assembly districts and 30.0% of the Senate districts. Only 22.8% of the present Assemblymen and 20% of the Senators are non-white. See p. 26, *supra*. Non-whites in Brooklyn enjoy, in relation to their proportion of the population, considerably less power than will non-whites in Richmond under the plan approved last Term by this Court in *City of Richmond* v. *United States*. Far from maximizing non-white voting strength, the 1974 lines fell considerably short of the demands of many non-whites[64] and had only a minor effect on the outcome of the subsequent election. There is considerable question as to whether the 1974 lines succeeded in overcoming the minimization of minority voting strength that were the fatal defect in the 1972 lines; clearly the 1974 lines did not achieve more than that.

CONCLUSION

The procedures followed by the Attorney General in objecting to the 1972 lines, and the method used by the Legislature in shaping the 1974 lines, were the same as those employed in more than 50 instances in which redistricting plans have been disapproved under section 5. This ap-

[64] See App. 293-298.

plication of the effect clause to redistricting was sanctioned by this Court in *Georgia* v. *United States,* and was well known to Congress when it reenacted the Voting Rights Act in 1975. In the face of that renewal, grounded upon a congressional preoccupation with redistricting and an awareness of the particular facts of this case, there is nothing in this case that would justify overturning the established construction and mode of application of the Act. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Respondents-Intervenors

LOUIS H. POLLAK
3400 Chestnut Street
Philadelphia, Pa. 19174

Of Counsel